STATE OF SOUTH DAKOTA | IN CIRCUIT COURT

COUNTY OF MINNEHAHA | SECOND JUDICIAL CIRCUIT

DANIEL DAILY,

Plaintiff,

vs.

FINDINGS OF FACT AND CONCLUSIONS OF LAW (Civ. 08-2478)

CITY OF SIOUX FALLS,

Defendant.

The Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This Court takes judicial notice that, according to the official website of the City of Sioux Falls, South Dakota (www. siouxfalls.org) at "Ordinances and Charter, Part 1 Charter", on September 13, 1994, at a special election, the City of Sioux Falls, South Dakota (hereinafter the City) adopted a Charter in accordance with the home rule power granted in Article IX of the South Dakota Constitution.

2. This Court takes judicial notice that, according to www.siouxfalls.org at "Ordinances and Charter, part II Revised ordinances, Chapter 3, Article VI, Administrative Appeals, on June 17, 1996, the City adopted the following ordinance:

ARTICLE VI. ADMINISTRATIVE APPEALS

Sec. 2-60. Appeal permitted.

Any party who is harmed by any action or decision of any agency or major organizational unit of the city concerning an administrative decision of a city official or officials from which an appeal is not otherwise provided, may appeal the decision. The mayor shall use his discretion and shall either assign three directors to sit as a board or hire an independent hearing examiner to hear the appeal.

Appeals shall be commenced by filing a written appeal with the agency or major organizational unit within ten days of the decision. The appeal shall include a statement of the action complained of, why the same should be modified or rescinded, whether the appellant desires appointment of a board or hearing officer or an open or closed hearing and an address where the appellant can be mailed notice of hearings. The director of the agency or major organizational unit shall immediately deliver a copy of the appeal to the city attorney who will act as legal counsel.

(Ord. No. 70-96, § 1, 6-17-96)

Sec. 2-61. Time of hearing and notice.

A public hearing, or a closed hearing if the board or hearing officer determines it is necessary, shall be held on all appeals within 15 working days after the filing of the appeal, unless a later date is agreed upon by the appellant and the board or hearing examiner. The major organizational unit or agency shall cause written notice of the date, time, and place of such hearing to be served upon the appellant by personal service or certified mail to the address set forth in the appeal at least five days before the hearing date.

(Ord. No. 70-96, § 1, 6-17-96)

Sec. 2-62. Hearing procedures.

The following rules shall govern the procedures for an administrative hearing:

(1) Hearings and administrative appeals need not be conducted according to the technical rules relating to evidence and witnesses.

(2) Oral evidence shall be taken only on oath or affirmation.

(3) The chairman of the board or the hearing examiner shall administer oaths or affirmations to witnesses.

(4) Any relevant evidence shall be admitted if it is the type of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence after objection in civil actions in courts of competent jurisdiction in this state.

(5) Irrelevant and unduly repetitious evidence and evidence that lacks trustworthiness shall be excluded.

(Ord. No. 70-96, § 1, 6-17-96)

Sec. 2-63. Rights of parties at hearing.

The appellant, the major organizational unit or agency, and any other party to an appeal shall have these rights among others:

(1) To call and examine witnesses on any matter relevant to the issue of the hearing;

(2) To introduce documentary and physical evidence;

(3) To cross examine opposing witnesses on any matter relevant to the issues of the hearing; and

(4) To rebut evidence.

(Ord. No. 70-96, § 1, 6-17-96)

Sec. 2-64. Decision.

After each appeal hearing, the board or hearing examiner shall perform the following:

(1) Make written findings of fact.

(2) Based upon such written findings, sustain, remand for further hearing or action, or rescind the complained action or decision. The board or hearing examiner may in its discretion waive the payment of any permit, reinstatement or late penalty fee.

(Ord. No. 70-96, § 1, 6-17-96)

Sec. 2-65. Report, costs.

A written report of the decision, including the findings of fact, shall be furnished to the appellant and the major organizational unit or agency within 15 working days from the date the appeal hearing is closed. The city and the appellant shall bear their own respective costs of the appeal proceeding. The decision of the board or hearing examiner shall be final.

(Ord. No. 70-96, § 1, 6-17-96)

Sec. 2-66. Subject to judicial review.

The decision of the board or the hearing examiner may be appealed to the circuit court as provided by law.

(Ord. No. 70-96, § 1, 6-17-96)

Secs. 2-67--2-69. Reserved.

See Trial Exhibit 19.

3. Plaintiff resides in a home he owns at 4916 East Maywood Drive, Sioux Falls, South Dakota. He received a warranty deed for the home June 30, 1999. (Trial Exhibit 27)

4. In the summer of 2004, Plaintiff was contacted by a person, who was engaged in the business of the laying cement driveways and sidewalks, about laying in a concrete extension to the east side of Plaintiff's existing driveway. This person had previously laid in such extensions for several houses on East Maywood Drive. Of the 30 houses on East Maywood Drive, Eleven (11), in addition to Plaintiff's home, had cement driveway extensions of various sizes laid in. (Trial Exhibits 5 and 26; page 38, line25- page 40, line 2 of the transcript of that part of the trial held on December 8, 2008, hereinafter identified by the letter "t"; and T page 73, lines 4-15)

5. This person quoted a price, and Plaintiff authorized this person to lay in a concrete extension to the east of Plaintiff's driveway, including up to a fire hydrant next to the sidewalk so that Plaintiff, who has a heart condition, could use a snow blower to clean snow away from the hydrant in the winter. Because of his heart condition, Plaintiff does not shovel snow. The person

then laid in the concrete extension. (T page 35, line 19-page 36, line 25; and pages 6-7 of City Exhibit 3, which is part of Trial Exhibit 59)

6. March 3, 2005, in the case of Hong Kien v. City of Sioux Falls (Civ. 04-2771, Second Judicial Circuit), Judge Joseph Neiles, on his own motion, dismissed the appeal of a citizen of an administrative ruling of the City. Judge Neiles ruled that he did not, as a Judge of the Second Judicial Circuit Court, have jurisdiction to hear an appeal from an administrative decision of the City. Specifically, Judge Neiles ruled that the South Dakota Administrative Procedures Act, set forth in SDCL 1-26, applies only to appeals of administrative actions of agencies of the State of South Dakota, and that no statutory authority exists to appeal an administrative decision of the City to Circuit Court. Judge Neiles went on to state that, in his opinion, citizens whose rights were adversely affected by the administrative actions of the City may be able to procure judicial review of the administrative actions through a Declaratory Judgment Action, pursuant to SDCL 21-30, or a request for a Writ of Certiorari, pursuant to SDCL 21-31, if there is no legal remedy available by statute. (Trial Exhibit 1)

7. Hong Kien did not appeal Judge Neiles decision to the South Dakota Supreme Court.

8. The City did not, following Judge Neiles' ruling, seek legislation from the South Dakota Legislature setting forth the manner in which a citizen could appeal an administrative ruling of the City, or any other municipality established by the Home Rule provision of Section 2 of Article IX of the South Dakota Constitution.

9. The City did not, following Judge Neiles' ruling, amend its ordinances to set forth the manner in which a citizen could appeal an administrative ruling of the City.

10. In April of 2006, Brad Hartmann, a Code Enforcement Officer for the City, went to Plaintiff's home, introduced himself, and asked Plaintiff what he intended to do about the warning he received regarding the concrete extension to his driveway. The Plaintiff testified that he never saw this warning. Mr. Hartmann testified that he "posted' the warning on a door to Plaintiff's home. Mr. Hartmann advised Plaintiff that the concrete extension to Plaintiff's driveway violated a City Ordinance prohibiting concrete being poured in the front setback and right of way. Plaintiff pointed out to Mr. Hartmann that many of the neighbors on East Maywood drive had such

extensions. Mr. Hartmann advised Plaintiff that he would have to seek a variance from the City, if he wanted to keep the extension. (T page 35, line 15- page 37, line 9)

11. May 19, 2006, two years after the laying in of the concrete extension of Plaintiff's driveway, Plaintiff filed paperwork with the City of Sioux Falls seeking a variance from the City's Board of Adjustment for a concrete driveway extension to attempt to avoid being cited by the Code Enforcement Officer for violation of a City Ordinance. (Trial Exhibit 2; and T page 35, line 15-Page 37, line 9)

12. May 30, 2006, Daniels Construction, Inc. served on the City, and filed with the Clerk of the Second Judicial Circuit Court, a pleading entitled "Notice of Appeal or Alternative Petition For Writ of Certiorari" in the case Daniels Construction, Inc. v. City of Sioux Falls (Civ. 06-1838). The pleading sought judicial review of an administrative hearing upholding assessment of liquidated damages against Daniels Construction, Inc. for late completion of a construction project. (Trial Exhibit 3)

13. June 16, 2006, the City's Board of Adjustment denied Plaintiff's request for a variance. (Trial Exhibit 4)

14. June 23, 2006, Plaintiff served on the city a Notice of Appeal of the Board of Adjustment's decision stating as grounds that the City was improperly selectively enforcing its ordinances against him for the concrete driveway extension. The Notice pointed that (a) 11 of Plaintiff's neighbors on East Maywood Drive, who had similar concrete extensions, were not being told to remove them or face citation by the city (b) 2 new driveway extensions on East Maywood Drive had been put in by neighbors since the Board of Adjustment hearing on his variance and (c) 60 such driveway extensions existed on 60 houses within the area of Rustic Hills Addition. Plaintiff attached pictures to the Notice of each of the 11 immediate neighbor's concrete extensions. (Trial Exhibit 5)

15. July 17, 2006, a hearing was held on Plaintiff's appeal of the Board of Adjustment's decision. Defendant represented himself. The hearing examiner upheld the decision of the Board. (Trial Exhibit 6)

16. Sarah Burnett, a Sioux Falls lawyer who was hired by the City to act as

the hearing examiner for Plaintiff's appeal, stated, at the trial of this matter before this Court, that in making her decision in this appeal, as in all appeals she handled, (a) the rules of evidence did not apply, (2) the citizen had the burden of proving that the action of the City was incorrect, (3) the Administrative Appeals Ordinance of the City does not provide for the subpoenaing of witnesses or documents, and (4) she advises the appealing citizen that they have the right to appeal her decision to a Circuit Court Judge.

17. August 22, 2006 the City moved to dismiss the petition of Daniels Construction, Inc. in the case of Daniels Construction, Inc. v. City of Sioux Falls (Civ. 06-1838) for the reasons that (a) the Second Judicial Circuit Court has no jurisdiction to hear an appeal from an administrative decision of the City pursuant to SDCL 1-26, utilizing Judge Neiles' ruling in Hong Kien v. City of Sioux Falls (Civ. 04-2771) as legal precedence; (b) the only procedure for judicial review of an administrative decision of the City is a proceeding for Writ of Certiorari pursuant to SDCL 21-31; and (c) no Writ of Certiorari was issued by a Circuit Court Judge and served as a complaint as required by SDCL 21-31-7. (Trial Exhibit 7)

18. August 24, 2006, Judge Srstka ruled in Daniels Construction, Inc. v. City of Sioux Falls (Civil Number 06-1838) that (a) the Second Judicial Circuit Court has no jurisdiction to hear appeals from administrative decisions of the City because SDCL 1-26 is only applicable to administrative decisions of agencies of the State of South Dakota and the City, having been created under the Home Rule provisions of Section 2 of Article IX of the South Dakota Constitution for local governments, is not an agency of the State of South Dakota; (b) Daniels Construction, Inc. did not receive from him, as a Circuit Court Judge, a Writ of Certiorari and serve a copy of that Writ on Defendant as required by SDCL 21-31-6; and (c) Daniels Construction, Inc. had 30 days to amend its pleadings to comply with the requirements of SDCL 21-31. (Trial Exhibit 8)

19. September 7, 2006, Mr. Hartmann hung on the door of Plaintiff's home at 4916 East Maywood Drive, a Citation numbered 1313. This Citation, as well as three subsequent Citations issued by Mr. Hartmann to the Plaintiff, which will be subsequently discussed, are similar to a traffic citation in that they have the name and address of the person accused of violating a law, the

date the violation allegedly occurred, what law was violated, the name of the officer who issued the Citation, and an acknowledgment section for the citizen to sign acknowledging receipt of the Citation. In the citizen acknowledgment section of Citation 1313, Mr. Hartmann wrote the word "Posted" on the signature line for the citizen. The Citation was not personally delivered to the Plaintiff, nor did the Plaintiff sign his name in the acknowledgment section. Plaintiff found the citation on the door to his home. Mr. Harman testified that he did not prepare or sign an affidavit of posting for this Citation, or any other citations that he places on doors of citizens. (T page 49, line 19- page 50, line 13)

20. Citation 1313 assessed a fine of $100, and stated after "Violation Details": "concrete poured in the required front setback and right of way." After "Code Sections", it stated; "15-49-060, 15-55-010, and 15-55-040." (Trial Exhibit 9)

21. September 15, 2006, Plaintiff served on the City a Notice of Appeal of Citation 1313. Plaintiff again raised the issue that the City was selectively enforcing the ordinances regarding cement in front set backs and right of ways, pointing out 11 homes out of 30 homes on his block that had cement driveway extensions. He set forth the address of each one of the 11 homes, and asked for the "Status and remedy regarding the concrete code violations for these addresses (2nd request)." The City never did provide Plaintiff information regarding whether the specific addresses he identified had been cited for violations of the same code sections and what the response of those citizens were. The Notice also stated that Plaintiff wanted to challenge the Citation in Court. (Trial Exhibit 10; T page 50, line 18- page 51, line 23; and T page 54, lines 1-8)

22. Shawna Goldammer, Zoning Enforcement Manager for the City; Jay Hammerich, an employee of the Zoning Department of the City; and Brad Hartmann, Zoning Enforcement Officer of the City all testified that issuance of zoning citations is entirely citizen complaint driven in that the City does not issue a zoning Citation unless a citizen has formally complained about the zoning ordinance violation.

23. However, (a) Shaun Tornow, the assistant city attorney who handles administrative appeals for the City of Sioux Falls, was aware of the Plaintiff's complaint that 11 of his neighbors on his block had driveway extensions like his, but never instructed Mr. Hartmann to cite any of the

Plaintiff's neighbors for having driveway extensions (b) Mr. Hammerich was aware of the Plaintiff's complaint that 11 of his neighbors on his block had driveway extensions like his, and drove by those addresses to look at Plaintiff's home, but did not ask Mr. Hartmann to cite these homes and (c) Mr. Hartmann was aware of the Plaintiff's complaint that 11 of his neighbors on his block had driveway extensions like his, and drove by those addresses to look at Plaintiff's home, but never cited any of these 11 homeowners.

24. September 21, 2006, Daniels Construction, Inc. filed an amended Application in Daniels Construction, Inc. v. City of Sioux Falls (Civil Number 06-1838). It sought a declaratory judgment that Daniels' constitutional rights had been violated by the City and a Writ of Certiorari seeking a declaration that the decision of the City that Daniels owed it liquidated damages was not supported by the facts or South Dakota law. (Trial Exhibit 12)

25. September 26, 2006, Plaintiff appeared at the 2nd floor conference room in City Hall pursuant to a notice that he had received in the mail from Defendant advising that his appeal of Citation 1313 would be heard at that date, time and place. (Trial Exhibit 11) But, no hearing took place. Instead, Shawn Tornow, an attorney of Defendant, asked Plaintiff to come with him to the conference room at the office of the City Attorney. A meeting then occurred with Tornow and Hartmann. Tornow advised Plaintiff that the hearing would have to be rescheduled to a later date. (T page 54, line 15-page 55, line 19).

26. On or about September 27, 2006, Mr. Hartmann issued Citation 1379 against Plaintiff. This Citation says it was mailed to Plaintiff. It was the same Citation Form as Citation 001313. It assessed another $100 fine. After "Violation Details", it stated: "Right-of- Way construction without a permit from City Engineering." The code section written in was "35 1/2-4." Above the signature line was handwritten the words "mailed". Above the date line was handwritten "9/27/06." (Trial Exhibit 13; and T page 56, line 7- page 58, line 12)

27. Rather than reset the administrative appeal hearing on Citation 1313, Mr. Hartmann issued Citation 1379. (T page 56, lines 6-18)

28. October 2, 2006, Plaintiff served on the City a Notice of Appeal from Citation 1313, because the City had not reset the hearing on Citation 1313 that had been cancelled and not reset (Trial Exhibit 14), and a Notice of Appeal from Citation 1379. (Trial Exhibit 15)

29. October 11, 2006, the City issued a Notice of Hearing advising Plaintiff that his appeals of Citations 1313 and 1379 would be heard in the Multi-Purpose Room located in the Carnegie Town Hall at 235 West 10th Street, Sioux Falls, SD at 2:30 p.m. on October 23, 2006.

30. There is a conflict in testimony as to whether the hearing on October 23, 2006 was ever held.

31. The Plaintiff testified that (a) he attended the hearing; (b) there were several city employees besides Mr. Tornow and Mr. Hartmann present (c) Mr. Tornow had a copy of the City Ordinances and made a preliminary statement (d) Mr. Hartmann talked and the Plaintiff asked him several questions (e) Mr. Tornow asked him to step out of the room for a few minutes (f) when he went back in the room only Mr. Tornow and another man was in the room and Mr. Tornow told him he had better remove the concrete or he would get more citations (g) Plaintiff left after this discussion and (h) Plaintiff never received a decision from the City regarding his appeals of Citations 1313 and 1379. He introduced his personal calendar noting the hearing, a billing from his attorney for consultation regarding the hearing dated October 26, 2006, and a letter to his attorney dated January 26, 2007 referring to his attendance at the hearing. (Trial Exhibit 17)

32. Rick Larson, the Fire Chief of the City at the time of the hearing, testified that he attended the hearing on October 23, 2006, as one of the three panel members, and that Plaintiff did not appear at the hearing. However, Mr. Larson admitted talking to Plaintiff's attorney in the fall of 2008, and having no recollection of the hearing. He advised then that he needed to get records from the City to see if it jogged his memory. Plaintiff's attorney then had a subpoena duces tecum served on Mr. Larson requiring him to bring with him to trial the following documents: (1) his calendar, as Fire Chief for the City, for September 26, 2006 and October 23, 2006 (2) notification of a hearing or meeting that he received, as Fire Chief for the City, to be held on September 26, 2006 or October 23, 2006 regarding the Plaintiff, or request for him to attend such a meeting or hearing (3) notes of any hearing regarding the Plaintiff on September 26, 2006 or October 23,

2006 made by him and (4) notes he made, or correspondence with others in City Hall, other than the City Attorney's Office, regarding the citations of the City against the Plaintiff. Mr. Larson admitted that, after he was served with the subpoena, he was again contacted by Plaintiff's attorney. He admitted advising Plaintiff's attorney that the City had not produced any of the documents identified in the subpoena duces tecum, and that Plaintiff's attorney did not then call him as a witness. He stated that he recalled the specifics of the hearing on October 23, 2006, after talking to Mr. Tornow.

33. Mr. Hartmann testified that that he attend the October 23, 2006 hearing, and that Plaintiff did not appear. However, Mr. Hartmann produced no documentation pursuant to the subpoena duces tecum served upon him, which required him to bring with him the following:

The original file kept by you and/or the Zoning Office of the City of Sioux Falls regarding Citations 001313, 001379, 002545, and 002546 issued by you against the Plaintiff, including (a) your notes, memos, and records of communications with citizens who complained about the issues dealt with in those Citations,(b) your notes, memos, and records of communications with any employee of the City of Sioux Falls, except the City Attorney's office, regarding the issues set forth in the Citations (c) your notes, memos, or records of the hearing on Citation 001313 scheduled for September 26, 2006 (d) your notes, memos, or records of the hearing on Citations 001313 and 001379 scheduled for hearing on October 23, 2006 (d) your notes, memos, and records of the hearing on Citations 002545 and 004526 scheduled for April 29, 2008 (e) any correspondence to or from the Plaintiff regarding the issues dealt with in those Citations and (f) any notices, including certified mailing receipts, regarding the hearings on September 26, 2006; October 23, 2006; and April 29, 2008.

Mr. Hartmann testified at trial, upon direct examination by Plaintiff's attorney, that he had no records to produce pursuant to the subpoena duces tecum served upon him. During that examination, he denied meeting with Plaintiff and Mr. Tornow in Mr. Tornow's office on September 26, 2006, discussing that Plaintiff was continuing to challenge Citation 1313, and that he issued Citation 1379 the next day. However, upon cross examination by Mr. Tornow, Mr. Hartmann recalled these events and said that it was his discussions with Mr. Tornow, after his direct examination that refreshed his recollection of the events.

34. Kathryn Rockwell, a paralegal with the City Attorney's Office, was subpoenaed and required to bring to trial the file of the City of Sioux Falls on the Citations that Plaintiff had appealed. She produced two groups of papers, which were marked Trial Exhibits 58 and 59. She explained that the two groups of papers came from various files in the offices of the City Attorney and the Zoning Department. She testified that, when she received the subpoena duces tecum, she

had to go through the various documents in several files and pull out the documents that she felt were appropriate to bring to court. She explained that, unlike a court system, in which all pertinent papers are kept in the chronological order of their filing, the City does not keep one file for each Citation that is appealed through the City's Administrative Appeals process. She testified that the City does not have a court reporter at its Administrative Appeals hearings, and uses a tape recorder instead. She testified that no tape recording is made memorializing a continuance of an Administrative hearing. Specifically there was no tape recording of the October 23, 2006 hearing in question. No document was generated documenting whether the hearing was held, or cancelled. There is no documentation that the Appeals of Citations 1313 or 1379 were ever rescheduled. She testified that the Zoning Officer never filed an affidavit of service as to any citations he issued, whether in person, by posting on a door, or by mailing. She admitted that she signed the name of Sarah Burnet, the hearing examiner, on the September 18, 2006 Notice of Hearing for the appeal of citation 1313.

35. Trial Exhibit 58 contained the following document in the following order: (a) Notice of Ordinance Violation #1113 addressed to Plaintiff, dated April 11, 2006, signed by Mr. Hartmann, with the box entitled "Posted" marked with and "X", stating poured concrete in front yard setback. Parking not allowed within 5 feet of property line, listing code sections 15-49-060, 15-55-010, and 15-55-040, and stating in the remedy section: "remove concrete"; (b) Citation Appeal for Citation 1313 dated September 15, 2006; (c) Citation 1313 dated September 7, 2006, with a file stamp stating : "Received Sep 15, 2006"; (d) Citation 1313 dated September 7, 2006, with no date stamp; (e) Notice of Hearing of Appeal of Citation 1313; (f) 2 photos of a house; (g) Administrative Appeal Hearing Witness Notification for Citation 1313 and 1379 to Jay Hammerich for October 23, 2006; (h) Notice of Hearing of Appeal of citations 1313 and 1379 dated October 11, 2006; (i) Administrative Appeal Hearing Witness Notification for Citations 1313 and 1379 to Karen Venebels for October 23, 2006; (j) A duplicate of the Notice to Venebels; and (k) Administrative Appeal Hearing Witness Notification for Citation 1313 for September 26, 2006 to Mr. Hartman. There were no copies of any of the 4 Citations that were appealed by Plaintiff (1313, 1379, 2545 and 2546) in Trial Exhibit 58.

36. Trial Exhibit 59 contained (a) Exhibits 1-5 of the City at a hearing on April 29, 2008 regarding Citations 2545 and 2546, which will be discussed later in these Findings; (b) 4 pictures with no exhibit number (two of them were of Plaintiff's home, and two were not); (c) Plaintiff's Exhibit N at the hearing on April 29, 2008, which contained copies of Citations 1313 and 1379, and Citation Appeals for 1313 and 1379; (d) Citation Appeal for Citation 2546 dated April 11, 2008; (e) Citation Appeal for Citation 2545 dated April 11, 2008; (f) a document entitled "Administrative Appeal hearing-Action Log" (g) Plaintiff Exhibits A-M at the hearing on April 29, 2008; (h) a second copy of the face page of City Exhibit 3 at the April 29, 2008 hearing; (i) A document that is unmarked that begins with paragraph 11; (j) a Board of Adjustment Certificate dated June 6, 2006, which is another copy of the second page of City exhibit 3 at the April 29, 2008 hearing; (k) another copy of the plot Plan that is Plaintiff's Exhibit I at the April 29, 2008 hearing, but without the Exhibit number, and is also page 3 of City Exhibit 3 at the April 29, 2008 hearing, without the exhibit number; (l) aerial photo that is a copy of the 4th page of City Exhibit 3 at the April 29, 2008 hearing; (m) a copy of The Findings and Conclusions from the decision of the Zoning Board of Adjustment dated June 16, 2006, which is duplicate of the 5th page of City Exhibit 3 at the April 29, 2008 hearing; (n) another copy of (e)-(i); (o) another copy of The Findings and Conclusions from the decision of the Zoning Board of Adjustment dated June 16, 2006, which is duplicate of the 5th page of City Exhibit 3 at the April 29, 2008 hearing; (p) another copy of Citations 2545 and 2546; (q) another copy of The Findings and Conclusions from the decision of the Zoning Board of Adjustment dated June 16, 2006, which is duplicate of the 5th page of City Exhibit 3 at the April 29, 2008 hearing (r) another copy of Citations appeal for 2545 and 2546 dated 4-14-08; (s) another Notice of Hearing for Citations 2545 and 2546 dated 4-21-08; (t) copy of The Findings an Conclusions in the Appeal of Citations 2545 and 1546 dated 5-2-08; (u) two pictures of Plaintiff's house with no date and no exhibit number; (v) another copy of The Findings an Conclusions in the Appeal of Citations 2545 and 1546 dated 5-2-08; and (w) a copy of the Notice of Entry of Decision dated 5-2-208, which is the last document of (m) (q) and (t).

37. This Court cannot tell from Trial Exhibits 58 and 59 whether the hearing on October 23, 2006 occurred or not. Mr. Hartmann and Mr. Larson produced none of the records or documents

they were subpoenaed to bring with them, and were unable to review such records to assist them with remembering events that occurred back in 2006.

38. For any Circuit Court Judge to review the manner in which the City handled an Administrative hearing, that Judge must be provided with a file of documentation of all notices of violation of ordinances, notices of hearings, notices of appeal, motions, hearing exhibits (both offered and received, and offered and denied, with subsequent offer of proof), and a copy of the written transcript of the hearing proceedings. The documents in the file must be in chronological order of filing, and should not contain duplicate documents.

39. Trial Exhibits 58 and 59 were poorly organized. The documents were out of chronological order. They contained duplicate documents. They contained documents without any exhibit number and without any indication of source. They had no index or summary of documents. They appear to be an accumulation of various documents from various files of the Zoning Department and Legal Department of the City of Sioux Falls. They are not organized in such a fashion that would have facilitated easy ascertainment of the pertinent documents related to the Citations by the citizen cited, or by a Circuit Court Judge asked to review the administrative hearing regarding the Citations.

40. February 8, 2007 Judge Srstka entered a Judgment and supporting Findings of Fact and Conclusions of Law in Daniels Construction, Inc. v. City of Sioux Falls (Civil Number 06-1838), finding that (a) SDCL 1-26, the South Dakota Administrative Procedures Act, does not apply to appeals from administrative decisions of the City of Sioux Falls (b) the ordinances of the City of Sioux Falls regarding administrative appeals granting to citizens the right to appeal such decisions to Circuit Court, but, when such decisions are appealed to Circuit Court, the city of Sioux Falls taking the position that there is no statutory authority allowing an appeal of the City's administrative decisions, and the only review of administrative actions of the city of Sioux Falls allowable by South Dakota statute is a Writ of Certiorari, is a violation of Section 2 of Article IX of the South Dakota Constitution, which provides for the creation of municipalities under a Home Rule Charter, provided administrative decisions of the municipality must be subject to judicial review, and is a violation of the citizen's constitution right to access to the Courts. The Judgment

stated that its effective date was delayed until July 1, 2007 (which is the effective date for non-emergency legislation passed by the 2007 South Dakota Legislature), "or such earlier date when Daniels is provided with a clear remedy." (Trial Exhibit 18)

41. Neither Daniel's Construction nor Defendant appealed Judge Srstka's February 8, 2008 decision in Daniels Construction, Inc. v. City of Sioux Falls (Civil Number 06-1838).

42. Following Judge Srstka's ruling in Daniels Construction, Inc. v. City of Sioux Falls (Civil Number 06-1838), the City of Sioux Falls did not seek legislation from the South Dakota Legislature providing specifics as to the appeal to Circuit Court from an administrative decision of the City. The only amending the City did to its ordinances regarding administrative appeals was to replace the words "subject to appeal to circuit court" to "subject to judicial review as provided by law" in Section 2-66 in Article VI, Administrative Appeals. (Trial Exhibits 18 and 19)

43. December 11, 2007, Judge Srstka entered Findings of Fact and Conclusions of Law, after a trial before him, in Daniels Construction, Inc. v. City of Sioux Falls (Civil Number 06-1838). He concluded that (a) the City's hearing examiner did not follow South Dakota law regarding liquidated damages, and erroneously concluded that South Dakota law did not apply because the City was governed by a Home Rule Charter, and (b) The hearing examiner's failure to follow South Dakota law, and the hearing examiners decision to place the burden of proof on the citizen, rather than on the City, resulted in the City failing to properly pursue its authority. (Trial Exhibit 21)

44. December 17, 2007, Judge Srstka entered a Writ of Certiorari in Daniels Construction, Inc. v. City of Sioux Falls (Civil Number 06-1838), remanding the matter back to the City's hearing examiner, and instructed the hearing examiner to follow the law of South Dakota regarding liquidated damages. (Trial Exhibit 21)

45. Neither Daniels nor the City appealed Judge Srstka's December 17, 2007 decision.

46. Paul Linde, a Sioux Falls attorney, represented Daniels Construction Company, Inc. Daniels Construction, Inc. v. City of Sioux Falls (Civil Number 06-1838). He testified that, after 18 months and many thousands of dollars in legal fees, and facing a remand back to the same hearing officer who had ruled against it, Daniels Construction, Inc., settled its claim against the

City for much less than it was entitled to. He testified that he did not even charge Daniels for the last part of his work because of how much it had already paid him seeking Circuit Court review of the City's administrative decision. He testified that he was told by the hearing officer, at the administrative hearing, that Daniels Construction, Inc. had the burden of proving the City wrong. Although the City's Administrative Appeals Ordinance says the rules of evidence do not apply to Administrative Hearings of the City, at the hearing, Mr. Tornow, who represented the City, objected to questions and documents submitted by Mr. Linde, and Mr. Tornow's evidentiary objections were often sustained by the hearing examiner. Mr. Linde pointed out that the City's Administrative Appeals Ordinance does not provide for pre-hearing discovery, or for the authority to subpoena witnesses or documents.

47. As is illustrated by Daniels Construction, Inc. v. City of Sioux Falls (Civil Number 06-1838), and Hong Kien v. City of Sioux Falls (Civ. 04-2771), the City's Administrative Appeals process is not limited to zoning matters. It is utilized for significant disputes with the City, including breach of contract disputes, licensing, and other legal issues regarding the City and its citizens. Gary Colwell, who was the City Attorney during the time that the various citations were issued Plaintiff, admitted this fact during his testimony in this matter.

48. Plaintiff heard nothing further from the City of Sioux Falls after the hearing on October 23, 2006, until he received in the mail, on or about April 11, 2008, two Citations from the City. The Citations are numbered 2545 and 2546. (Trial Exhibits 22 and 23) The City never generated a written decision regarding the appeal of 1313 and 1379. If, as the City claims, Plaintiff failed to show at the hearing on October 23, 2006, the City did not file a document in its files regarding the Citations memorializing that Plaintiff failed to show up at the hearing, or mail such a document to Plaintiff. The City did not reset the hearing. The City did not institute a lawsuit in Circuit Court to procure a judgment that would compel Plaintiff to remove the cement in question or pay the fines stated in Citations 1313 and 1379. The City just issued new citations for the same alleged zoning violations.

49. Citation 2545 is on the same standardized form as Citation 1313. It cites the same Code sections. It cites the same $100 fine. It lists the same address as location, Plaintiff as the violator,

and Brad Hartmann as the Officer. It describes the violations as "concrete poured in the required front setback", which is the same as Citation 1313, but it left off the words "and Right-of Way" which were on Citation 1313. It is dated "4-11-08", while Citation 1313 is dated "9/7/06". Above the signature line it has the word "mailed' hand written in, while Citation 1313 had the word "posted" hand written in above the signature line. "4/11/08" is handwritten in above the date line, while "9-7-06" is handwritten in on Citation 1313 above the date line. Citations 2545 and Citation 1313 are for the same alleged violation of Defendant's Ordinances.

50. Citation 2546 is on the same standardized form as Citation 1379. It cites the same Code section. It lists the same $100 fine. It lists the same address as location, Plaintiff as the violator, and Brad Hartmann as the Officer. It describes the violations as "Concrete in the Right of Way without permit" while Citation 1379 states" Right-of-Way Construction without a permit from City Engineering." It is dated 4-11-08, while Citation 1379 is dated "9/27/06". It has "mailed" handwritten in above the signature line, just as Citation 1379 did. Citations 2546 and Citation 1379 are for the same alleged violation of Defendant's Ordinances.

51. Shawna Goldammer, the zoning enforcement manager for the City, testified that, a number of years ago, she attended a meeting with the City Attorney's office regarding zoning violations where the decision was made not to use the Circuit Court system to enforce zoning violations, except in certain select cases. She testified that, rather than use the Circuit Court to enforce zoning violations, the City just repeatedly cited the citizen for the same violation over and over again, until the citizen finally complied with the zoning ordinances.

52. April 14, 2008, Plaintiff served on the City a Notice of Appeal as to Citations 002545 and 002546. He stated as grounds double jeopardy and selective enforcement. He asked the City to commence a lawsuit against him in Circuit Court so that a Judge could review the actions of the City. (Trial Exhibit 24).

53. April 21, 2008 The City mailed to Plaintiff a Notice of Hearing advising that the hearing on his appeal of Citations 2545 and 2546 would be held in the old Council Chambers in City Hall on April 29, 2008. Above the signature block for James Robbennolt, the Independent Hearing Examiner, is hand written "Kathryn A. Rockwell, Legal Assistant for" (Trial Exhibit 25) At the

trial of this matter, Ms. Rockwell admitting signing the Notice for Mr. Robbennolt, and that she is not his legal assistant. She said that she often prepares, and signs for the Hearing Examiners, the Notice of Hearing.

54. After receiving the Notice of Hearing, Plaintiff retained Charles Dorothy, a Sioux Falls attorney, to represent him at the April 29, 2008 hearing.

55. At the hearing on April 29, 2008, Plaintiff was advised by James Robbennolt, the Sioux Falls attorney the City hired to act as Hearing Examiner, that the Plaintiff, not the City, had the burden of proof. (T page 89, line 5- page 90, line 7)

56. At the hearing on April 29, 2008, Plaintiff attempted to introduce evidence supporting his grounds of double jeopardy and selective enforcement, including pictures of neighbor's homes with concrete driveway extensions similar to his and a printout of a part of Defendant's website listing over 700 outstanding unpaid citations, with only one being for a violation of ordinances because of a concrete driveway extension. The only one was Plaintiff. Mr. Tornow, who represented the City at the Hearing, repeatedly objected to the introduction of such evidence, and most of the evidentiary objections were upheld by Robbennolt. Mr. Tornow objected 38 times during Plaintiff's attorney's examination of Plaintiff, and 30 times during Plaintiff's attorney's cross examination of Jay Hammerich of the City Zoning Office. (25:15-35:57 and 25:11-25:57 of Trial Exhibit 32, which is a CD recording of the April 29, 2008 hearing provided the Plaintiff by the City, and lines 10-19 of page 134 of the Transcript of the first day of trial on December 8, 2008)

57. This Court heard testimony and received evidence regarding Plaintiff's claims of selective enforcement, including the following, which Mr. Robbennolt refused to admit into evidence: (a) a Plat of Rustic Hills Addition (Trial Exhibit 26); (b) the warranty deed showing when Plaintiff received title to his home (Trial Exhibit 27); (c) an aerial photo of the Rustic Hills Addition, with the homes with driveway extensions noted (Trial Exhibit 28); (d) pictures of Plaintiff's home and the 11 others on his block with driveway extensions (Trial Exhibit 29); and (e) a copy of part of the website of the City showing all outstanding citations for the 365 days prior to April 24, 2008 (Trial Exhibit 30).

58. Plaintiff is the only person listed on Trial Exhibit 30 as having been cited for cement in his front set back, or construction in a right of way without a permit.

59. At the trial of this matter, Shawna Goldammer testified that, at the time Plaintiff was cited for his driveway extension, the City did not have an ordinance in place requiring a permit to lay concrete at a residence. She said there was, however, an ordinance requiring a permit to perform construction in a right of way.

60. There was no court reporter at the April 29, 2008 hearing. There is a dispute as to whether both the hearing examiner and Mr. Tornow had hand held tape recorders, which is the recollection of the Plaintiff, or just one recording, which was the testimony of Ms. Rockwell, who brought with her to the trial a copy of the CD pursuant to a subpoena duces tecum served on her by the Plaintiff's attorney. The City had at least 2 tape recorders at the hearing because at one point on Trial Exhibit 32 Mr. Tornow says he has to change tape in the other machine and there is a sound of changing a tape in a tape recorder. (Trial Exhibit 32, Side B, 2:00; line15 of page 129-line 15, page 133 of the Transcript of the first day of trial on December 8, 2008). Mr. Robbennolt testified that he did not have a tape recording device at the hearing and made no recording of the hearing. (T page 90, line 12-page 91, line 7). During argument regarding his motion to quash the subpoenas issued by Plaintiffs attorney, Mr. Tornow stated that he ran one recording device and Mr. Robbennolt the other recording device. (T page 27, lines 20-22).

61. Trial Exhibit 32 does not have good sound quality. Quite often, you cannot understand the questions, the evidentiary objections, or the answers. Sounds of jet planes occasionally flying over the building made it hard to hear the attorneys and witnesses. The attorneys and witnesses sometimes talked at the same time, making both of their comments unintelligible. Plaintiff's attorney hired typists at $14 an hour to listen to Trial Exhibit 32, and type up a transcript. But, after 35 hours of listening and typing, they advised that they had done the best they could but many parts of the tape were of such poor quality they just could not make out what the people were saying. Although the Plaintiff requested that the City provide him a transcript of the April 29, 2008 hearing, the City provided no transcript of the hearing. (Trial Exhibit 32, Trial Exhibit 34, and T page 127, line 1- page 129, line 23, page 129)

62. The poor sound quality of Trial Exhibit 32 and the lack of a written transcript of the proceedings hampers this Court in its duty to provide meaningful review of the propriety of the hearing that occurred on April 29, 2008.

63. At the April 29, 2008 hearing, Plaintiff's attorney objected to hearsay testimony by Jay Hammerich regarding a board of adjustment hearing that was held June 13, 2006, and raised the issue that the recording of the hearing would be the best evidence. Mr. Tornow offered to produce the record later, and Robbennolt allowed the testimony, subject to later production of the record by Tornow. (Trial Exhibit 32, side B 13:0116:35).

64. At the trial of this matter, Mr. Hammerich produced a document that he had typed up based upon the tape recording of the hearing before the zoning Board of Adjustment that he had made on June 13, 2006. The document had 7 blanks lines on it in various places. Mr. Hammerich testified that, when he could not make out what people were saying on the tape, he would try to figure it out from the surrounding context of the conversation or recall it from his own memory, but, if he could not, he would just type in a blank line.

65. The hearing before the Board of Adjustment on a variance request by Plaintiff, after Plaintiff was told by Mr. Hartmann that the cement extension to his driveway violated City Zoning ordinances, and the Board's denial of the variance, is not the subject of the legal issues presently before this Court. The Plaintiff appealed that decision through the City's administrative appeal process, the Hearing Examiner ruled against him, and he did not seek review of that decision by a Circuit Court Judge.

66. The legal issues before this Court are (a) whether the manner in which the City attempted to enforce the citations of the violation of their zoning ordinances by Plaintiff violated Plaintiff's constitutional rights to due process and equal application of the laws, and (b) whether Article VI. Administrative Appeals as written, and as applied, violates the due process rights of its citizens.

67. At the April 29, 2008 hearing, Mr. Hammerich testified that the City only enforces zoning violations if it gets a complaint from a citizen. (Trial Exhibit 32, side B, 25:11-25:57) He repeated that in his testimony before this Court. Mr. Hartmann and Ms. Goldammer testified

similarly at the trial before this Court. Ms. Goldammer testified that she did not have enough personnel to cite every zoning code violation in the City.

68. At the April 29, 2008 hearing, when Plaintiff's attorney asked Mr. Hammerich what citizen complaint the City was acting on when Mr. Hartmann issued Citations 2545 and 2546, which were issued 18 months after Citations 1313 (9-7-06) and 1379 (9-27-06). Mr. Tornow objected to the question. Mr. Robbennolt upheld the objection. Plaintiff's attorney then asked Mr. Hammerich to answer as an offer of proof. Mr. Tornow objected to the offer of proof. (T page 135, line 23-136, line 10

69. At the trial of this matter, Mr. Hartmann admitted that there was no new citizen complaint when he issued Citations 2445 and 2546. He issued the citations after consulting with Mr. Tornow.

70. At the April 29, 2008 hearing, Plaintiff's attorney asked Mr. Hammerich if he had even driven by Plaintiff's home to look at the driveway extension in question. Mr. Hammerich said he had. When Plaintiff's attorney asked Mr. Hammerich if he noticed that many of Plaintiff's neighbors had similar driveway extensions, Mr. Tornow objected and instructed Mr. Hammerich not to answer the question. Plaintiff's attorney sought to have Mr. Hammerich answer the question as an offer of proof. Mr. Tornow objected to the making of an offer of proof. Mr. Robbennolt upheld the objection. (Trial Exhibit 32, 44:43-50:38; T page 136, line –page 137, line 4)

71. At the trial of this matter, Mr. Hammerich admitted that, when he went out to look at Plaintiff's residence, he saw that many of Plaintiff's neighbors had similar driveway extensions, and that he did not have Mr. Hartmann issue any violations to those neighbors.

72. At the April 29, 2008 hearing, during a break, in the presence of Mr. Robbennolt, while Mr. Dorothy and Mr. Tornow were conferring with Mr. Colwell outside the hearing room, Mr. Hartmann verbally accused Plaintiff of being a liar. This confrontation was not on Exhibit 32, but was testified to by Mr. Robbennolt, Mr. Hartmann, and Mr. Daily. Mr. Robbennolt said it did not affect his decision. (T page 130, line 4-page 132, line 11)

73. At the April 29, 2008 hearing, Plaintiff requested that he be allowed to submit proposed findings of fact and conclusions of law and to object to any such findings and conclusions

submitted by Defendant. Mr. Robbennolt denied this request, and drafted his own findings and conclusions, finding in favor of the City. (Trial Exhibit 32, Side B, 1:11:44-1:13:23; and Trial Exhibit 35)

74. Section 2 of Article IX of the South Dakota Constitution states in pertinent part:

A chartered government unit may exercise any legislative power or perform any function not denied by its charter, the Constitution or the general laws of the state. The charter may provided for any form of executive, legislative and administrative structure which shall be of superior authority to statute, provided that the legislative body so established be chosen by popular election and that the administrative proceedings be subject to judicial review.

(Trial Exhibit 36)

75. Section 20 of Article VI of the South Dakota Constitution states:

> All courts shall be open, and every man for an injury done him in his person, property or reputation, shall have remedy by due course of law, and rights and justice, administered without denial or delay.

(Trial Exhibit 50)

76. SDCL 21-31-8 states:

> The review upon writ of certiorari cannot be extended further than to determine whether the inferior court, tribunal, board, or officer, has regularly pursued the authority of such court, tribunal, board, or officer.

(Trial Exhibit 38)

77. By contrast to SDCL 21-31-8, SDCL 1-26-36 of the South Dakota Administrative Procedures Act states:

The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) In excess of the statutory authority of the agency: (3) Made upon unlawful procedure: (4) Affected by other error of law; (5) Clearly erroneous in light of the entire evidence in the record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment. The circuit court may award costs in the amount and manner specified in chapter 15-17.

(Trial Exhibit 39)

78. SDCL 1-26-18 provides for discovery, and for subpoenas of persons and documents at contested hearings under the South Dakota Administrative Procedures Act. (Trial Exhibit 40)

79. SDCL 1-26-19 provides that the rules of evidence shall be followed, and all privileges recognized by law are available, at contested hearings under the South Dakota Administrative Procedures Act. (Trial Exhibit 41)

80. SDCL 1-26-17 (7) provides that the citizen has the right to have the dispute heard by a hearing examiner from the Office of Hearing Examiners, if the value of the amount in controversy exceeds $2,500. (Trial Exhibit 42)

81. SDCL 1-26-17 (8) requires that the Notice of Hearing in contested cases under the South Dakota Administrative Procedures Act advise the citizen that there is a right to appeal the administrative decision to the Circuit Court and Supreme Court of the State of South Dakota. (Trial Exhibit 42)

82. SDCL 1-26-18.3 requires the Office of Hearing Examiners to assign a hearing examiner to contested cases, if the amount in controversy exceeds $2,500 or if a property right could be terminated. (Trial Exhibit 43)

83. When asked during his testimony at the trial of this matter, Gary Colwell said that, although the City's Administrative Appeals ordinance say that the Mayor will decide whether an independent hearing examiner, or a panel of three City employees, would hear an administrative appeal, that duty had been delegated by the Mayor to the City Attorney, who made the decision. When asked why the City Attorney's Office decided that the October 23, 2005 hearing on citations 1313 and 1379 would be held in front of a panel of 3 City employees, rather than in front of a hearing examiner, as was initially scheduled, Mr. Colwell testified that there were times when, for budgetary reasons, the City used three City employee panels, rather than independent hearing examiners.

84. Mike Hall, the City employee who chairs the three City employee panel, admitted during his testimony before this Court that neither he, nor any of the City employees who sit as panel members, have legal educations. When asked by Plaintiff's attorney how he, as chairman of the panel, handled evidentiary objections, Mr. Hall said that the rules of evidence do not apply at their hearings, but, if any objections were made, he looked to the Assistant City Attorney who attended the hearing to deal with the objection.

85. SDCL 1-26-33 requires the agency, whose decision is appealed to the Circuit Court by a citizen, to transmit to the Circuit Court the original and certified copy of the entire record of the proceeding under review. It states in pertinent part:

> It shall be the duty of the agency to assemble and consecutively number the pages of all documents, papers, and exhibits filed with the agency, including any opinions and decisions which the agency may have filed or authorized for filing. The agency shall then prepare and attach an alphabetical and chronological index to the record and shall serve a copy of such index on all parties to the review proceedings at the time the record is submitted to the reviewing court.

(Trial Exhibit 44)

86. SDCL 1-26-36.1 provides that a citizen may obtain review of an agency decision under the South Dakota Administrative Procedures Act by filing a Notice of Review with the Clerk of the Circuit Court. (Trial Exhibit 45)

87. SDCL 10-11-43 states that a decision of a hearing officer from the office of Hearing Examiners may be appeal pursuant to the South Dakota Administrative Procedures Act. (Trial Exhibit 46)

88. SDCL 15-6-4 (g) provides that service of pleadings and other important documents in a lawsuit shall be evidenced by an affidavit of service filed in the file. (Trial Exhibit 48) Mr. Hartmann admitted that he files no affidavit of service when he mails, or posts citations.

89. The 14th Amendment to the United States Constitution states that no citizen shall "be deprived of life liberty, or property without due process of law." (Trial Exhibit 49)

90. Section 2 of Article VI of the South Dakota Constitution states: "No person shall be deprived of life, liberty or property without due process of law." (Trial Exhibit 51) The words "due process" have been interpreted by the Federal Courts and South Dakota Courts to mean procedures designed to make sure that governmental decisions are based upon facts and application of law to the facts. The words have been interpreted to require notice and an opportunity to be heard, serving the notice in such a fashion that there is proof that it was received by the party it is applicable to, the right to an attorney, the right to rules of evidence being followed, the right to subpoena witnesses and compel the production of documents at the evidentiary hearing or trial, the right to confront one's accuser, the right to cross examine witnesses, the right to an accurate transcript of the proceedings, the party asserting a matter to

have the burden of proving the assertion, and the right to findings of fact and conclusions of law that are supported by the evidence produced at the evidentiary hearing or trial and existing statutory law, regulations, or judicial decisions.

91. Section 18 of Article VI of the South Dakota Constitution states: "No law shall be passed granting to any citizen, class of citizens or corporations, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations." 91. Section 1 of the 14th Amendment to the United States Constitution states that no state shall make or enforce any law which deprives a citizen of due process, or equal protection of the law.

92. Section 9 of Article VI of the South Dakota Constitution states that "no citizen shall...be put in jeopardy for the same offense." The 5th Amendment to the United States Constitution has a similar provision. Federal and South Dakota court decisions interpreting this provision refer to trying the person more than once for the same offense as "double jeopardy."

93. The City argues that Section 9 of Article VI of the South Dakota Constitution only applies to criminal proceedings, and the citations against Plaintiff are civil not criminal, in nature. But, as will be addressed in the Conclusions of Law, the concept of the inappropriateness of multiple claims for the same issue is applicable in civil proceedings under the concept of collateral estoppel (also known as Issue Preclusion).

CONCLUSIONS OF LAW

1. The City of Sioux Falls, although created pursuant to the home rule provision in Section 2 of Article IX of the South Dakota Constitution, is subject to the Constitutions of the United States, and the State of South Dakota.

2. The manner in which the City attempted enforcement of its zoning ordinances against the Plaintiff violated the Plaintiff's Constitutional Rights to Due Process and Equal Application of the Law.

3. The City's Administrative Appeals Ordinance (Article VI, Administrative Appeals) as written, and as applied, violates citizens' Constitutional Right to Due Process of the Law.

4. Specifically, the following violated Plaintiff's Constitutional right to Due process of Law:

(a) Section 2-62 (1), which states that administrative hearings do not have to be conducted according to the rules of evidence.

(b) Article V Administrative Appeals has no provision for issuance of subpoenas to compel the appearance of witnesses, or production of documents, or for interrogatories or requests for production of documents. Lack of such provisions renders ineffective Section (1) of Section 2-63, which states that any party to an administrative appeal can call witnesses; Section (2) which says the parties can introduce documentary and physical evidence; or Section (4), which states that the parties have a right to rebut evidence. Citizens who appeal administrative decisions of the city can only call witnesses who agree to appear. Citizens have no authority to require an employee of Defendant to testify or produce documents.

(c) Mr. Tornow's voicing evidentiary objections 68 times during the administrative hearing on April 26, 2008, as Plaintiff was attempting to introduce evidence relevant to his claims, while at the same time claiming that the rules of evidence do apply to the proceedings when the Plaintiff objected to evidence that Mr. Tornow was attempting to introduce in support of the claims of the City. Just as Judge Srstka concluded in Daniels Construction, Inc. v. The City of Sioux Falls (Civ. 06-1838) that the City violated the due process rights of Daniels Construction, Inc. by advising that it could appeal the City's Administrative Decision, but, when it did so, moving to dismiss its appeal to Circuit Court, claiming that there is no appeal to Circuit Court from an administrative decision of the City, this Court concludes that it was a violation of the due process rights of the Plaintiff for the City to claim at the administrative hearing on April 26, 2008 that the rules of evidence apply when the Plaintiff tried to present his case, but did not apply when the City presented its case.

(d) The City reversing the usual burden of proof that requires the government to prove that the citizen has violated a law in a criminal matter, or to prove its entitlement to a claim against a citizen in a civil matter, thereby creating a presumption that the City acted correctly, and placing on the citizen the burden of overcoming that presumption and proving the City acted improperly.

(e) The City failing to keep the files regarding Plaintiff's Citations in such a manner that the pertinent documents are in the chronological order in which they were filed, and are not duplicated, so Plaintiff, or this Court could easy review them.

(f) The City failing to keep an adequate record of the hearing held on April 29, 2008.

(g) The hearing examiner, at the hearing on April 29, 2008, excluding relevant evidence regarding the selective enforcement of City's zoning ordinances to the Plaintiff.

(h) The City choosing to repeatedly issue citations to Plaintiff for the same zoning ordinance violations, rather than seek an order from a Circuit Court Judge establishing the validity and amount of the applicable fine. The City has no obligation to commence a civil action against Plaintiff in Circuit Court for violations of its zoning ordinances, but the Plaintiff also has the right to be free from the cost and burden of being cited repeatedly for the same zoning ordinance violations. Due process would be satisfied by one appropriately conducted administrative hearing regarding a zoning ordinance violation. Multiple citations and multiple hearings on the same violation violates the citizen's Constitutional Right to Due Process.

7. The South Dakota Supreme Court has held that Section 18 of Article VI of South Dakota Constitution requires that the rights of every person be governed by the same rule of law, under similar circumstances, and that equal protection does not mean that all persons be treated identically, but it does require that distinctions have some relevance to the purpose for which the classification is made. State v. Krahwinkel, 2002, 656 N.W. 2nd 451, and State v. Geise, 2002, 656 N.W. 2nd 30.

8. Judgment should be entered consistent with these Findings and Conclusions, and Disbursements assessed by the Clerk according.

Dated this 12th day of November, 2009.

By the Court:

Judge Kathleen K. Caldwell

Attest:
Charles Fechner, Clerk
By: _____, Deputy Clerk

FILED
NOV 13 2009
Minnehaha County, S.D.
Clerk Circuit Court